

No. 77-1597

Supreme Court, U. S.  
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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**JOSEPH T. and MARIE T. GELINAS, PETITIONERS**

**v.**

**COMMISSIONER OF INTERNAL REVENUE**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

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**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

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JOSEPH T. and MARIE T. GELINAS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
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**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

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**OPINIONS BELOW**

The findings of fact and opinion of the United States Tax Court (Pet. App. C, pp. 18-25) are not officially reported. The opinion of the court of appeals (Pet. App. A, pp. 9-15), as amended (Pet. App. B, pp. 16-17), will not be officially reported.

**JURISDICTION**

The judgment of the court of appeals was entered on January 3, 1978. The order of the court of appeals denying a timely petition for a rehearing filed by petitioners was entered on February 6, 1978. The petition for a writ of certiorari was filed on May 8, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.



### QUESTION PRESENTED

Whether petitioners are required to recognize for federal income tax purposes a portion of the gain they realized on the sale of their principal residence because they did not occupy a newly constructed house as their principal residence within 18 months of the sale.

### STATUTES INVOLVED

The pertinent provisions of Section 1034 of the Internal Revenue Code of 1954 (26 U.S.C.), and the Mass. Laws Ann., c. 130, §27A (1972) are respectively set forth at Pet. App. H, pp. 35-36, and Pet. App. I, pp. 37-38.

### STATEMENT

On June 7, 1971, petitioners sold certain real property located at Lewis Bay on Cape Cod, which included their principal residence, a motel, and a ferry boat landing. Petitioners realized a net amount of \$152,339.20 from the sale of the residence, the adjusted basis of which was \$25,200 (Pet. App. C, p. 19).

On the same date, petitioners purchased a lot and a small house located nearby on Harbor Bluff Road at a cost of \$44,000. Petitioners intended to remodel and reconstruct the house. Petitioner Joseph Gelinas occupied this house from June 7 until July 15 in order to work on the new design, to watch his boat, and to enjoy the view of the bay. Petitioner Marie Gelinas spent her days at the Harbor Bluff house, but she returned to sleep at the original Lewis Bay residence which petitioners had leased temporarily from the purchaser. Most of petitioners' belongings, including their furniture, remained at the Lewis Bay residence (Pet. App. A, p. 11; Pet. App. B, p. 16; Pet. App. D, pp. 27-28).

On July 15, 1971, due to a contractor's error, the Harbor Bluff house became unusable for reconstruction. As a result, the house had to be completely torn down

and Joseph Gelinas moved back to the Lewis Bay house with his wife. Petitioners remained there until March 24, 1972, when they purchased and moved into another house located on Blackberry Lane. They purchased this house for their daughter and her family at a cost of \$51,509.11 (Pet. App. A, p. 11).<sup>1</sup>

In the meantime, petitioners began construction of a new house at the Harbor Bluff property. On September 30, 1971, however, the Director of Marine Fisheries, Department of Natural Resources of Massachusetts, issued a stop order preventing further construction of a seawall. Moreover, local authorities charged the building contractor with alleged violations of a Massachusetts environmental law. The contractor was subsequently acquitted and resumed construction on September 5, 1972 (Pet. App. C, pp. 19-20).

Petitioners were unable to complete construction by December 5, 1972. They did not move from the Blackberry Lane residence into their newly constructed house at Harbor Bluff until May 31, 1973, nearly two years after the sale of the first residence. The final cost of the new house was \$165,000 (Pet. App. A, p. 11).

On their 1971 income tax return, petitioners claimed deferral of the gain that they realized on the sale of their Lewis Bay residence under Section 1034 of the Internal Revenue Code of 1954 (26 U.S.C.), because the amount

<sup>1</sup>Most of the facts were stipulated. After the Tax Court entered its opinion, petitioners moved to reopen the record alleging certain additional facts. Specifically, they alleged that Joseph Gelinas had moved into the house located at Harbor Bluff for the six weeks before it was torn down and that this constituted use as a principal residence. They asserted that the Blackberry Lane house was purchased by them only for their daughter and her family and was not used by them as a principal residence. The Tax Court denied the motion (Pet. App. D, pp. 26-29).

they invested in the newly constructed Harbor Bluff residence exceeded the adjusted sales price of the Lewis Bay residence. On audit, the Commissioner determined that only that part of the gain absorbed by the purchase of the Blackberry Lane residence was deferrable. He determined that no part of the gain was deferrable by virtue of petitioners' investment in the newly constructed house at Harbor Bluff, because petitioners had not used this house as their principal residence within 18 months after the sale of the Lewis Bay residence (Pet. App. A, pp. 11-12). The Tax Court upheld the Commissioner's determination (Pet. App. C) and the court of appeals affirmed (Pet. App. A; Pet. App. B).

#### ARGUMENT

1. Section 1034(a) of the Internal Revenue Code of 1954 provides that if a taxpayer sells his principal residence and, within a period beginning a year before the date of such sale and ending a year after such sale, purchases property and uses it as his principal residence, the gain from the sale of the old residence would be recognized only to the extent that its adjusted sales price exceeds the cost of the new residence. Section 1034(c)(5) provides that if the taxpayer begins construction of the new residence before the expiration of one year after the date of sale of the old residence, the statutory period is 18 months commencing with the date of sale.<sup>2</sup>

<sup>2</sup>In 1975, Section 1034 was amended by the Tax Reduction Act of 1975, Section 207, 89 Stat. 26. It now provides that the relevant period before and after the sale is 18 months generally, and in the case of a new house the construction of which is begun by the taxpayer within 18 months of the date of sale, the period after the sale is 2 years. The amendments apply only to sales or exchanges of residences occurring after December 31, 1974. Hence, contrary to petitioners' suggestion (Pet. 4), they have no bearing on this case.

The decision below correctly held that petitioners were not entitled to Section 1034 nonrecognition treatment as a result of their construction of the Harbor Bluff property. The undisputed facts establish that petitioners sold their former principal residence on June 7, 1971, and began construction of a new residence, the total cost of which exceeded the adjusted sales price of the old residence. However, they did not move into the new residence until May 31, 1973, more than 23 months after the sale. Accordingly, they did not meet the requirement of Section 1034(a) and (c)(5) that they use the new property as their principal residence within 18 months of the sale of the old residence.

Petitioners contend (Pet. 6) that they should be allowed an equitable 11-month extension of the statutory period because construction of their new house had been suspended for 11 months pending the outcome of their dispute with Massachusetts environmental authorities. But, as the courts below correctly recognized, the plain language of Section 1034 provides an absolute rule that gain from the sale of a principal residence can be deferred only if the taxpayer uses his new home as his principal residence within the statutory reinvestment period. *United States v. Sheahan*, 323 F. 2d 383 (C.A. 5); *Elam v. Commissioner*, 58 T.C. 238, affirmed *per curiam*, 477 F. 2d 1333 (C.A. 6); *Bayley v. Commissioner*, 35 T.C. 288; *Henzel v. Commissioner*, 24 T.C.M. 1344; *Commissioner v. Baertschi*, 412 F. 2d 494 (C.A. 6); *Stolk v. Commissioner*, 40 T.C. 345, affirmed *per curiam*, 326 F. 2d 760 (C.A. 2). Accordingly, petitioners are not entitled to nonrecognition treatment even though the delay in the construction of their new house was beyond their control.<sup>3</sup>

<sup>3</sup>Petitioners suggest (Pet. 4, 6) that the order issued by Massachusetts authorities (Pet. App. F, pp. 32-33) was illegal. But they did not send to the Department of Natural Resources their



2. Petitioners argue alternatively (Pet. 7) that Joseph Gelinas' alleged six-week use of the Harbor Bluff house, prior to its destruction, constituted use as a principal residence. But the Tax Court found his limited use of the property did not constitute use as a principal residence within the meaning of Section 1034(a).

At all events, the courts below correctly determined that whether petitioners used the original Harbor Bluff residence as a principal residence was irrelevant, in light of their subsequent purchase of the Blackberry Lane property. Section 1034(c)(4) provides that if a taxpayer purchases more than one residence and uses each of those residences as a principal residence during the period provided by Section 1034(a), only the last of such residences so used shall constitute the new residence for purposes of determining the amount of the gain subject to deferral in accordance with Section 1034(a). Thus, the Commissioner allowed deferral of part of the gain realized by taxpayers, because he determined that within a year after the sale, petitioners purchased and used the Blackberry Lane property as their principal residence.<sup>4</sup>

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notice of intent to build the seawall until September 18, 1971 (Pet. App. F, p. 32), 17 days after they had commenced its construction (Pet. App. C, p. 19). Petitioners' delay in sending their notice of intent to the state authorities appears to have violated Mass. Laws Ann., c. 130, §27A (1972) (Pet. App. I, pp. 37-38), which required that written notice of any proposed construction be sent to the Department's Director of Marine and Fisheries at least 30 days prior to the commencement of construction.

<sup>4</sup>The conclusion that the Blackberry Lane property constituted petitioners' principal residence necessarily follows from the fact that it was the only property petitioners used as a residence between March 24, 1972, and May 31, 1973.

# CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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